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IN THE

SUPREME COURT OF THE UNITED STATES

No. 930

CLINTON KURCK ..... *Petitioner*

Vs.

THE STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Petitioner, Clinton Kurck, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Arkansas, of November 12, 1962, and the denial of a rehearing thereon on December 17, 1962, which decision affirmed the judgment of the Circuit Court of Cleburne County, Arkansas, entered on January 5, 1962.

OPINION BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed herein is officially reported in Arkansas Law Reporter, No. 22 _____ Arkansas, page _____.

JURISDICTION

The final judgment of the Circuit Court of Cleburne County was entered January 15, 1962 (R. 11). That judgment was affirmed by the Supreme Court of Arkansas on November 12, 1962. On November 29, 1962, Petitioner flied his Petition for Rehearing before the Supreme Court of Arkansas (R. 305-306) and on December 17, 1962, the Petition for Re-hearing was denied. The jurisdiction of this Court is involved under 28 U. S. C. Sec. 1257, (3).

QUESTION PRESENTED

Whether the State of Arkansas has jurisdiction to try Petitioner in the state court for an offense allegedly committed on lands purchased by the United States Government from the State of Arkansas.

CONSTITUTIONAL PROVISIONS

Article 1, Section 8, Clause 17 of the Constitution of the United States of America, provides that Congress shall have power:

> "(17) To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and
>
> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers,

and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

STATUTES INVOLVED

Title 40, Section 255 U. S. C. A., provides:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Act 327 of the Acts of the General Assembly of the State of Arkansas, for the year 1939, appearing as Section

10-1103 of the Arkansas Statutes, 1947, Annotated, is as follows:

"The consent of the State of Arkansas is given to the acquisition by the United States by purchase or condemnation with just compensation or by grant or otherwise, of such lands in the State of Arkansas as in the opinion of the Federal Government may be needed for the construction of dams, reservoirs, floodways, locks, canals, hydro-electric power plants, channel improvements, channel diversions, and for such other works as may be necessary for the control of floods, the development of hydro-electric power, the irrigation of lands, the conservation of the soil, recreation, and other beneficial water uses; and the jurisdiction of this state within and over all grounds thus acquired by the United States within the limits of the State of Arkansas is hereby ceded to the United States. Provided, that this grant of jurisdiction shall not prevent execution of any processes of this State, civil or criminal, on any person who may be on said premises."

Public Law 780, page 1248, on page 1260, 68 Stat., Vol. 68, 83rd Congress, 2d Session 1954.

"WHITE RIVER BASIN"

"The general comprehensive plan for flood control and other purposes for the White River Basin approved by the Flood Control Act of June 28, 1938, as amended, is hereby modified to provide for the generation of power in conjunction with flood control at Greer's Ferry Reservoir and the addition of Beaver Reservoir

for flood control, power generation, and other purposes, substantially as recommended by the Chief of Engineers in his report dated February 19, 1954."

And on pages 1266 and 1267 of Public Law 780, 68 Stat: Vol. 68:

"60 Stat. 642, Sec. 209. That Section 4 of this Act approved July 24, 1946 (Public, Number 526) Seventy-Ninth Congress, is amended to read as follows:

"The Chief Engineer, under the supervision of the Secretary of the Army, is authorized to construct, maintain and operate public parks and recreational facilities in reservoir areas under the control of the Department of Army, and to permit the construction, maintenance and operation of such facilities. The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, in reservoir areas for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: Provided, that leases to non-profit organizations for park or recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: Provided further, that preference shall be given to Federal, State or local governmental agencies, and licenses, or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a reservoir area for any public purpose, when the Secretary of the Army determines such

action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable; And provided, that in any such lease or license to a Federal, State or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests or other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance and utilization of such lands. Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may deem appropriate. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing and other recreational purposes and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary. No use of any area to which this Section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All monies received by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts."

STATEMENT

Clinton Kurck and his brother, Horace, were both accused on November 8, 1961, by information filed by the Prosecuting Attorney (R. 1) of Cleburne County, Arkansas, with raping one Phyllis Carlton in Cleburne County on November 6, 1961. The State nol prossed as to Horace Kurck (R. 10) and the case was tried as to Clinton Kurck on January 4, 1962, in the Cleburne County, Arkansas Circuit Court.

Proof in the case revealed that the offense took place on lands condemned and taken by the United States on April 7, 1959, for construction of the Greers Ferry Dam in the County of Cleburne, State of Arkansas.

On January 4, 1962, and prior to the trial of the case in Cleburne County, Circuit Court, Petitioner filed his Motion to Dismiss for Lack of Jurisdiction, in that said alleged crime was committed on lands which were acquired by the United States by the Declaration of Taking filed in the United States District Court for the Eastern District of Arkansas, on the 7th day of April, 1959, for flood control and hydro-electric power purposes, as well as for conservation and recreation, and the jurisdiction over such ground thereby ceded to the United States of America by the State of Arkansas, pursuant to the provisions of Arkansas Statutes 10-1103 (R. 3).

The above motion was heard and over-ruled by the Court (R. 10).

The Declaration of Taking shows that the land condemned and purchased in this instance by the United States is 54.70 acres in Cleburne County, Arkansas, formerly the property of Tom Taylor, et ux. (R. 6)

Ira Fullerton, a witness for the defendant, testified that he knew the land immediately at the North end of Miller Bridge on Highway 16 over Red River and it belonged to Tom Taylor before it was acquired by the United States government. Mr. Fullerton has known the land about 26 years. He appeared as an expert witness in the trial of the condemnation case when the government took this particular tract of land. (R. 275)

The prosecuting witness said they went out to the Miller Bridge where the assault occurred.

On January 5, 1962, and after trial to the cause, the jury in the within cause found Petitioner "Guilty of Attempt to Commit Rape" and fixed his punishment at four years in the Arkansas State Penitentiary (R. 11).

On January 15, 1962, Petitioner filed his Motion to Set Aside the Verdict and Grant a New Trial, in which Motion he re-stated that the Cleburne County Circuit Court has no jurisdiction over the offense for the reason that the same was committed upon lands belonging to the United States government and over which the State of Arkansas had ceded its jurisdiction (R. 13).

On the same day, January 15, 1962, the Motion for New Trial was over-ruled and the Court fixed Petitioner's

punishment at four years in the Arkansas State Penitentiary and so sentenced him (R. 11).

Petitioner appealed to the Supreme Court of Arkansas where his conviction was affirmed and in its decision the Supreme Court of Arkansas considered the question of jurisdiction, as raised both in the lower court and in the Supreme Court, and found that there was no merit in Petitioner's contention of want of jurisdiction in the State of Arkansas. (See Supreme Court Opinion in Appendix).

Petitioner, on November 29, 1962, then filed his Petition for Re-hearing in the Supreme Court of Arkansas, in which Petition he again raised the question of lack of jurisdiction in the State of Arkansas to try Petitioner for the reason that the crime was committed on land taken by the United States government (See Appendix).

On December 17, 1962, the Supreme Court of Arkansas denied Petitioner's request for a re-hearing. (See Appendix).

Petitioner is here on Petition for Writ of Certiorari asking for a review of the decision of the Supreme Court of Arkansas, which decision affirmed the judgment of the Cleburne County Court, for error which he claims was committed in the trial of said cause in the assumption of jurisdiction by the Cleburne County Circuit Court, and its affirmance by the Supreme Court of Arkansas.

REASONS FOR GRANTING

The decision of the Supreme Court of Arkansas in this case cites no precedent or authority for its holding that jurisdiction over the lands taken by the United States can be acquired only by notice of acceptance of jurisdiction from the authorized officer or agent of the governmental agency to the Governor of the State of Arkansas.

The Arkansas Court's opinion, in its ultimate decision, conforms to the holding of this Court in *Adams Vs. United States*, 319 U. S. 312, 63 S. Ct. 1122, 87 L. Ed. 1421, but in neither the instant case or the Adams case, supra, is the question raised, or considered, as to the method of acquisition by the United States over the lands under consideration.

There is a distinction between the two methods of acquisition by the government, lands that are "ceded" to and lands acquired through purchase by the United States, in the light of the judicial interpretation of Article I, Sec. 8, Clause 17 of the Constitution of the United States. *United States Vs. Warne*, 190 Fed. Supp. 645 (1960).

The Constitution of the United States grants to Congress exclusive legislation over all places purchased by the consent of the Legislature of the State in which the land lies. Article I, Sec. 8, Clause 17 of the Constitution of the United States.

The exclusion and absence of any requirement in the Constitution that the government of the United States

shall accept jurisdiction over land purchased by the government is consistent only with an intent that jurisdiction of the United States attaches upon purchase and vesting of title to the land in the Government. *Mintz vs. Baldwin*, 289 U. S. 346, 351.

The express reservation by the State of Arkansas of certain limited areas of jurisdiction, such as the reservation of the right of execution of any process of the State, civil or criminal, on any person who may be on the premises, likewise, is consistent only with an intent that jurisdiction would otherwise pass to the United States. Vol. 2, Ark. Statutes Anno (1947) Sec. 10-1103; *United States Vs. Warne*, supra.

Public Law 780, page 1248, provides for the generation of power in conjunction with flood control at Greer's Ferry Reservoir and the Addition of Beaver Reservation for flood control, power generation and other purposes.

Public Law 780, pages 1266-1267, fixes full authority on the Chief Engineers, under supervision of the Secretary of the Army, to control, limit and regulate practically every activity on the lands purchased by the government at Greer's Ferry Reservoir.

Exclusive legislative power is in essence complete sovereignty. *S. R. A. Inc. Vs. Minnesota*, 327 U. S. 558, 562.

When title is acquired through purchase, by consent of the Legislature of the States, the Federal jurisdiction is exclusive of all state authority by virtue of Article I, Sec. 8, Clause 17 of the Constitution of the United States.

Ft. Leavenworth R. R. Co. Vs. Lowe, 114, *U. S.* 525, 530. See Declaration of Taking. (R. 4, 5 & 6).

Clause 17 of Article I, Sec. 8 of the Constitution, with reference to the exclusive jurisdiction of the United States, governs those cases where the United States acquires lands by purchase, with the consent of the Legislature of the States for the purposes therein described, acceptance of jurisdiction by the government is not necessary. *James Vs. Dravo Contracting Co.*, 302 U. S. 134, 142.

If lands are otherwise acquired and jurisdiction is "ceded" by the State to the United States, the terms of the cession, determine the extent of the Federal jurisdiction, *James Vs. Dravo Contracting Co.*, 302 U. S. 134, 142.

No other legislative power than that of Congress can be exercised over lands purchased within a State by the United States with her consent. Such consent, under the Constitution, operates to exclude all other legislative authority.

Ft. Leavenworth R. R. Co. Vs. Lowe, 114 U. S. 525, 538; 5 S. Ct. 995; 29 L. Ed. 264.

Exclusive legislation is consistent only with exclusive jurisdiction. *James Vs. Dravo Contracting Co.*, 302 U. S. 134, 142.

The State of Arkansas was pre-emptied of its jurisdiction upon the taking of these lands through purchase by the Government, under Public Law 780, pages 1266-1267, and Act I, Sec. 8, Clause 17 of the United States Constitution.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

Kurck v. State.

5045

Opinion delivered November 12, 1962.

Appeal from Cleburne Circuit Court; *Woody Murry*, Judge; affirmed.

CARLETON HARRIS, Chief Justice. Appellant, Clinton Kurck, was charged by information with the crime of rape, it being alleged that on November 6, 1961, he assaulted and raped one Phyllis Carlton. Appellant filed a motion to dismiss the information, asserting that the court had no jurisdiction over the area wherein the alleged crime was committed, due to the fact that such lands were acquired by the United States on August 18, 1959, and jurisdiction over the territory had been ceded to the United States by the State of Arkansas, pursuant to Section 10-1103, Ark. Stats. Anno. The motion was overruled by the court, and on trial, the jury found appellant guilty of the crime of Assault with Intent to Rape, and fixed his punishment at four years confinement in the Arkansas State Penitentiary. From the court's judgment so entered, appellant brings this appeal. For reversal, appellant relies upon five points, as follows:

I

The court has no jurisdiction for the reason that the scene where the alleged crime was committed had been condemned and taken by the United States Government on August 18, 1959, and under Arkansas Statute 10-1103,

which was then in effect, all jurisdiction of the State had been ceded to the United States Government.

II

The defendant was entitled to examine the jury panel on *voir dire* as to their conscientious belief as to the death penalty.

III

The court erroneously refused defendant's instruction No. 1 and instructed the jury as to the crime of assault to commit rape — the intercourse being admitted.

IV

The court erred in permitting leading questions by the State.

V

The court erred in refusing defendant's requested instruction No. 2 relative to prosecutrix's duty to make an outcry.

We proceed to discuss each alleged error in the order listed by the appellant.

I

In 1939, the Legislature enacted Act 327 which appears in Volume 2, Ark. Stats. Anno. (1947) as Section 10-1103. That section reads as follows:

"The consent of the State of Arkansas is given to the acquisition by the United States by purchase or condemnation with just compensation or by grant or otherwise, of such lands in the State of Arkansas as in the opinion

of the Federal government may be needed for the construction of dams, reservoirs, floodways, locks, canals, hydro-electric power plants, channel improvements, channed diversions, and for such other works as may be necessary for the control of floods, the development of hydro-electric power, the irrigation of lands, the conservation of the soil, recreation, and other beneficial water uses, and the jurisdiction of this state within and over all grounds thus acquired by the United States within the limits of the State of Arkansas is hereby ceded to the United States. Provided, that this grant of jurisdiction shall not prevent execution of any processes of this State, civil or criminal, on any person who may be on said premises."

Title 40 U. S. C. A., Section 255, deals with the acquisition by the United States of jurisdiction over lands to which it has acquired title for various purposes.[1] Pertinent portions read as follows:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the

[1] This also codified as 33 U.S.C.A., § 733, and 50 U. S. C. A., § 175

United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

In 1959, the Arkansas General Assembly passed Act 256[1a] [§ 10-1127 through 10-1129, 1961 Supp.], which had the effect of repealing Section 10-1103, since the provisions of 10-1103 and 10-1127 and 10-1128 are in conflict.[2] This, of course, is known as "repeal by implication". The act, *inter alia*, provides that the United States, through a duly authorized department, agency, or officer, shall file a notice of intention to acquire legislative jurisdiction, with the Governor. "The notice shall contain a description adequate to permit accurate identification of the boundaries of the land or other area for which the change in jurisdictional status is sought and a precise statement of the measure of legislative jurisdiction sought to be transferred."

The Governor then makes his recommendations, together with those of the Attorney General, to the next session of the General Assembly "which shall be constitutionally competent to consider the same". Further, the Chief Executive shall cause duly authenticated copies of the notice and act to be recorded in the office of the Recorder of the county where the land or other area affected by the transfer of jurisdiction is situated.

[1a] Under the provisions of the act, it was to become effective on January 1, 1960.

[2] The act has no repealing clause.

Appellant calls attention to the fact that in our first act [10-1103], there was no provision for specific or additional action on the part of the state, or the United States, before jurisdiction passed to the federal government. Appellant says, "The statute unequivocally and without any attempt at providing a method whereby the United States might acquire jurisdiction for criminal purposes automatically ceded all jurisdiction over the lands." Appellant then points out that the United States filed its Declaration of Taking in the United States District Court on August 18, 1959,[3] and, under his view, at that time, jurisdiction over these particular lands passed to the United States Government. Appellant emphasizes that this taking occurred before the effective date of Act 256 of 1959 [10-1127 through 10-1129, 1961 Supp.], and, accordingly, argues that jurisdiction over the premises where this alleged offense took place, was in the United States Government on November 6, 1961, the time of the occurrence complained of. It is not really necessary to discuss which state statute was in effect at the time of the alleged offense for appellant's argument is fallacious from another standpoint. The portion of Title 40, Section 255, heretofore quoted, provides that the head or other authorized officer of the government agency may accept jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor or such other manner as prescribed by the laws of the state; further, "unless and until the United States has accepted jurisdiction over

[3] This date appears in the motion to dismiss for lack of jurisdiction, though the date used in the Declaration of Taking is April 7, 1959. It is immaterial in this case as to which date is correct.

lands hereafter to be acquired as aforesaid, it shall be conclusively presumed[4] that no such jurisdiction has been accepted." It is, thus, apparent that, even though Section 10-1103 was the effective state act at the time of taking, still under Title 40, the United States Government had not accepted jurisdiction over these lands, *i. e.*, the record does not reflect that notice of acceptance has been filed with the Governor of Arkansas, or jurisdiction accepted in any other manner. Certainly, the state cannot force jurisdiction upon the federal government, and until such time as an acceptance is filed by the United States, jurisdiction remains in this state. The burden was upon appellant to establish a lack of jurisdiction, and this has not been done. We thus find no merit in this contention.

II

Appellant contends that he was entitled to question each member of the jury panel relative to such juror's views concerning the death penalty. Upon objection by the Prosecuting Attorney, who had previously stated that he was not seeking the death penalty, the court refused to permit the respective jurors to answer. Even if this ruling by the court constituted error, we are unable to see how appellant was prejudiced. Of course, if the jury had brought in a verdict fixing punishment at death in the electric chair, a far different matter would be presented. Here, however, the sentence was rather light, and we have held that where an error by the court inures to the advantage of a defendant, he cannot be heard to com-

[4] Bouvier's Law Dictionary, Volume 1, Page 579, defines "Conclusive Presumption" as follows: "A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise."

plain. *Bruce v. State*, 68 Ark. 310, 57 S. W. 1103; *Glenn v. State*, 71 Ark. 84, 71 S. W. 264.

In addition, it does not appear from the transcript that appellant exhausted his peremptory challenges. This, in itself, would preclude the finding of merit on this point. See *Green v. State*, 223 Ark. 761, 270 S. W. 2d 895, and *Nail v. State*, 231 Ark. 70, 328 S. W. 2d 836.

III

Appellant stoutly maintains that the court erred in not giving his requested instruction No. 1, and by instructing the jury on the crime of assault with intent to commit rape, inasmuch as he admitted the act of intercourse with the prosecuting witness, but contended that such act was committed with her consent. Appellant's requested instruction No. 1 defined the crime of rape, and further stated,

"If these allegations are proved beyond a reasonable doubt, there is but one form of verdict that would be responsive, that is, guilty as charged, the punishment of which is death in the electric chair or life imprisonment at hard labor. Under the evidence in this case, you would have to find the defendant either guilty of rape or not guilty of any offense; there is no evidence here that would authorize this court in submitting any other offense whatever than that laid in the Information, which is rape."

This instruction was refused. The court, over the objections of appellant, gave the following instruction:

"Under this information it is competent for you if you think the evidence justifies it, to convict the defendant of

rape, of assault with intent to commit or to acquit the defendant outright."

The court then defined the charge of assualt with intent to commit rape. Appellant, which admitting that the cases of *Harrison v. State*, 222 Ark. 773, 262 S. W. 2d 907 and *Bradshaw v. State*, 211 Ark. 189, 199 S. W. 2d 747, hold that the charge of assault with intent to rape may be included within the charge of rape, under circumstances similar to the case before us, then asserts there is a conflict in our decisions, and cites the cases of *Whittaker v. State*, 171 Ark. 762, 286 S. W. 937, and *Bailey v. State*, 227 Ark. 889, 302 S. W. 2d 796. In those two cases, we held that the trial court did not err in refusing a request from the defendant for an instruction on assault with intent to rape. Appellant feels that the latter cases express the proper view, and should govern this appeal. It is not here necessary to reconcile the holdings in these cases, for the facts in the instant appeal fall squarely within the holding in *Harrison v. State, supra*. There, the evidence on the part of the prosecutrix was to the effect that she was forcibly raped by Harrison, while Harrison admitted intercourse, but insisted that it was with her consent. The jury was instructed that it could find the appellant guilty of the lesser offense of assault with intent to rape, and appellant contended (as is here contended) that he was either guilty of rape, or no crime at all. This court, quoting from *Bradshaw v. State, supra*, stated.

" 'An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former offense under an indictment for the latter. * * * If it be conceded that the testimony would logically demand a verdict of guilty of rape or nothing, it does not follow that a

conviction of an attempt to rape should be avoided here. The jury had the power to return the verdict and the offense is less than the crime charged.

"It was therefore clearly permissible for the jury to convict appellant of the lesser crime of assault with intent to rape, when charged with rape.' "

In *Lindsey v. State,* 213 Ark. 136, 209 S. W. 2d 462, appellant contended that, because the state's evidence went only to the charge of rape, the jury should not have been instructed on the crime of assault with intent to rape. We said,

"Appellant is mistaken in thinking that *attempt* is not included in a charge of rape. He relies upon *Whitaker v. State,* 171 Ark. 762, 286 S. W. 937, where Mr. Justice Wood said the trial court correctly instructed that, under the testimony there, the appellant, if not guilty of rape, was entitled to an acquittal. *He did not say, however, that it would have been error to instruct that attempted rape was included in the greater charge.*"[1]

It follows that this point is too, without merit.

IV

Appellant complains that the court erred in permitting certain leading questions by the state. All were objected to and exceptions saved. Those questions were as follows:

"Did you resist his efforts to rape you?"

"Now, at this point, may I ask you this, were you wearing what we ordinarily refer to as panties?"

---

[1] Emphasis supplied.

"Young lady, tell the jury whether or not this intercourse was of a painful character."

"Was that (inserting his hand or finger in prosecutrix) painful to you."

"Did you say in response to a question propounded to you by Mr. Lightle that you screamed or didn't scream at the time he inserted his private in your body?"

In the first place, it does not appear that some of the questions come within the category of leading questions, and certainly, we cannot see how any prejudice resulted to accused. Appellant says that these questions "inflamed" the minds of the jurors, and also states that the first question assumes a fact not supported by testimony, *i. e.*, intercourse without the prosecutrix's consent. As to the last, Miss Carlton certainly testified that the act of intercourse was without her consent, and that she struggled to prevent it. As to the former, there are several facts in evidence, which would likely have been much more persuasive in "inflaming the minds of the jury" — if the jury had been inclined, or subject, to being "inflamed". For instance, it was definitely established by the testimony of Dr. Nathan Poff, who examined Miss Carlton, that she was a virgin prior to the act complained of. From his testimony:

"I examined this white female, and the physical examination revealed a well developed, well nourished white female apparently as stated 18 years old in near hysterical state, quite nervous, tense — after some discussion I was able to calm her down and at this time was able to from examination find a torn blouse, a bruised right thumb, a

scratch on her right arm, a linear bruise on her right shoulder, scratched inner thigh, approximately the upper third of the thigh. The woman was having some bleeding from the vaginal vault or vaginal bleeding. * * *

"Q. Did you examine the hymen?

A. Yes, sir.

Q. Was it intact?

A. No, it was not intact.

Q. Could you determine how recently it had been broken?

A. In my estimation it had recently been broken due to the fact that there was active bleeding at that time.

Q. In your opinion was this young lady a virgin prior to this breaking?

A. In my honest opinion I believe she was." * * *

Q. . . . you say in your honest opinion she was a virgin recently, is it possible she might not have been?

A. Medically speaking or miraculously speaking?

Q. Medically speaking?

A. No.

Q. In your opinion there was no way in which she could not have been a virgin?

A. That's right."

Other facts might also be mentioned; viz, that appellant, who was in this state on a visit from the state of Washington, did not tell Miss Carlton that he was mar-

ried when he made the date with her, and also gave a fictitious name (for the purpose, as he stated, so his wife "wouldn't find out anything"). Of course, it is quite obvious from the verdict entered, that the jury was in no wise prejudiced by any question, or testimony. The penalty of only four years imprisonment under evidence that would have supported a conviction for rape, is ample answer to appellant's contention.

V

Finally, appellant asserts the trial court erred in refusing to instruct the jury that it was the duty of Miss Carlton "to give alarm, and make an outcry, when she first learned of defendant's desire to have sexual intercourse with her". The trial court properly refused this instruction, for it is not the law. The identical contention was raised in the case of *Jackson v. State*, 92 Ark. 71, 122 S. W. 101, and this court held that such an instruction was properly refused, commenting, however, that the failure to make an outcry might be considered in connection with other facts and circumstances as tending to show want of resistance. In the instant case the Cleburne Circuit Court told the jury.

"You are instructed that if you find from the evidence in this case that the prosecutrix failed to make an outcry or complaint at the time of and during the alleged rape, or immediately thereafter, you should take such fact into consideration with all the other facts and circumstances in the case in passing upon whether or not the alleged sexual intercourse, if any, was with or without the consent of the prosecutrix."

This was a correct statement of the law, and was the proper instruction to be given to the jury.

While not argued, some other alleged errors are set out in the motion for new trial. These, too, have been examined, and found to be without merit.

Finding no reversible error, the judgment is affirmed.

IN THE SUPREME COURT OF ARKANSAS

October Term 1962 November 12, 1962

CLINTON KURCK ..... APPELLANT

Vs. Appeal from Cleburne Circuit Court

THE STATE OF ARKANSAS ..... APPELLEE

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Cleburne County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is, therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that unless appellant shall, forthwith, surrender himself to the Supreme Court in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this Court, in this cause expended, and have execution thereof.

November 12, 1962

IN THE SUPREME COURT OF ARKANSAS

CLINTON KURCK ..... APPELLANT

Vs. No. 5054

THE STATE OF ARKANSAS ..... APPELLEE

PETITION FOR REHEARING

Comes the Appellant, Clinton Kurck, and respectfully moves the court for a rehearing upon his appeal in this matter, and for reason states:

I

Appellant's first point alleging error was that the court had no jurisdiction for the reason that the scene of the alleged crime was committed upon lands taken by the United States Government.

This honorable court, in its opinion, reached the conclusion that since the record failed to show that the United States had filed a Notice of Acceptance with the Governor of the State, that it was to be presumed that the United States Government did not have jurisdiction over the lands.

Although Title 40 U. S. C. A., Section 255, provides as set forth in the opinion, the United States Federal Courts, as pointed out in the cases cited in Appellant's Brief, have unanimously declared that when a Declaration of Taking is filed by the United States Government, title and control over the lands involved then passes to the United States. *U. S. Vs. 37.37 acres of land in Kern and Tulare Counties*, Cal. 1960, 181 Fed. Supp. 712; *U. S Vs. Hayes*, 172 *Fed.* 2d 677. If title and control have passed, then it is incorrect to say that the Government has not accepted jurisdiction over the lands.

IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1962

PROCEEDINGS OF DECEMBER 17, 1962

CLINTON KURCK ..... APPELLANT

Vs. No. 5045

THE STATE OF ARKANSAS ..... APPELLEE

ORDER

Rehearing denied.

December 17, 1962